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No. 660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

WILLIAM McCRONE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON CERTIORARI TO 9th C. C. A.

PETITIONERS BRIEF

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Filed March....., 1939.

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I. The opinions of the courts below:

The opinion of the Circuit Court of Appeals for the Ninth Circuit (100 F. 2d, 322), (R. 110) and the dissenting opinion of Judge Haney (R. 16).

The opinion of the District Court in and for the District of Montana is as yet unreported in any published volume.

II. JURISDICTION

1. The date of the decision and of the judgment of which review is asked is December 13, 1938 (R. 121). and the date of the order denying petition for rehearing is January 16, 1939 (R. 122), and the petition was served

and filed in this Court within 30 days after the order denying the petition for rehearing in accordance with the rules in criminal cases, R. 11 of the Rules of Criminal Procedure.

2. The statutory provision sustaining jurisdiction of this Court is Sec. 347 of Title 28 USCA; Sec. 240, U. S. Judicial Code, as amended by the act of February 13, 1925.

3. A specific claim is advanced and relied on that the Court of Appeals ruling in dismissing the appeal of McCrone without a hearing on the merits as if the appeal were from a judgment punishing the appellant for civil contempt is erroneous and calls for the assuming of jurisdiction in certiorari by this Court because the act of the trial court was in fact an order in a proceeding for criminal contempt and was appealable under the rule relative to criminal appeals by notice without petition and McCrone followed all of the requirements of the rules as to criminal appeals.

4. Cases believed to sustain jurisdiction of this Court are:

Bessette vs. W. B. Conkey Company, 194 U. S. 324 (wherein this court answered the Circuit Court of Appeals for the Second Circuit that it should review by writ of error a judgment of contempt by a trial court against a person who was not a party to a civil suit pending).

Union Tool Company vs. Wilson, 259 U. S. 107.

III. STATEMENT OF THE CASE

William McCrone was on April 21, 1938, summoned to appear to testify and to produce books in the matter of the tax liability of.....
(that is to say nobody at all), District of Montana, for the years 1932 to 1937, inclusive, and no books and papers were mentioned. The summons was signed by Paul W. DeFoe, a special agent. (R. 27.)

He appeared before the agent and refused to testify.

A motion was made in the United States District Court of Montana by the Assistant Attorney of the United States in and for the District of Montana, for a rule for McCrone to show cause why he should not be compelled to testify. (R. 27.)

McCrone answered that he had expressed a willingness to testify as to any matter, the answer to which would not incriminate him or have a tendency to incriminate, and he expressed the willingness to appear again before Paul W. DeFoe (R. 27). The Court made an order on April 23, 1938, that McCrone appear at an hour named on the 23rd day of April, 1938, before DeFoe, an agent and officer of the Internal Revenue Bureau, and testify of all matters and facts within your knowledge and "concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. De Foe, as such officer and agent." (R. 31.) No other designation of what inquiry or investigation was going on appears anywhere in the record. McCrone appeared before Mr. DeFoe and on being asked certain questions, answered that he would not answer, that it would tend

to "criminate me." "I will not be a witness against myself." (45 R.)

On April 26, the Court issued a rule and order stating that it appeared from affidavit of DeFoe that McCrone has disobeyed the order and judgment of date, April 23, 1938, and does hold the Court and its judgment in contempt. The Court ordered McCrone to appear "to show cause, if any you have, why you should not be punished for your disobedience of the said order of this Court of date, April 23, 1938, and for your acts and conduct in holding this Court its authority and its said order in disregard and contempt." (R. 46.) (A completed offense.)

McCrone made motion to quash. (47 R.) In this motion he announced that no civil action is pending connected in any way with this proceeding. (48 R.) This was overruled and McCrone plead not guilty. (58 R., 6 R.) Thereupon the trial court on April 28, 1938, ordered McCrone committed to the custody of the marshal and to be confined in jail until the said McCrone purges himself by obeying the order of April 23, and giving testimony before DeFoe of all matters and facts within his personal knowledge concerning the subject matter of the inquiry and investigation now being carried on by DeFoe. (83 R.)

There was still no certainty as to what investigation was meant.

This was after a finding by the Court that McCrone wilfully, deliberately, and wrongfully disobeyed the order and refused and neglected to give his testimony and that McCrone was in defiance and contempt of this Court and of its said order and of its authority. (R. 82.)

On request the trial court refused to fix bail. McCrone's counsel announced a purpose to appeal or seek some appropriate review of the proceeding of the Circuit Court of Appeals. The trial court said: "There will be no bail fixed. This is a civil proceeding. It has none of the elements of a criminal action." (R. 85.)

A Bill of Exceptions was duly settled. (86 R.) Within five days thereafter, notice of appeal was served and filed. (R. 2.) Assignment of errors was served and filed. (R. 87.)

The Circuit Court of Appeals admitted McCrone to bail over the objections of the United States on May 9, 1938, in the sum of $7,500.00. (108 R.) He is at liberty on bail. Briefs were filed in the Court of Appeals according to rule.

The appeal was argued September 22, 1938 (109 R.). The opinion of the Court is found 110 R. The appeal was dismissed, because the requirements for appeals in civil cases had not been followed. The dissenting opinion of Circuit Judge Haney is found 116 R.

Petition for rehearing was filed January 11, 1939, "and within time allowed therefor, by rule of Court." (122 R.) It was denied on January 16, 1939. There was an order staying issuance of the mandate until February 16, 1939, and in the event of a petition for writ of certiorari being docketed before such time the mandate shall be further stayed until the Supreme Court passes upon the petition. The mandate is stayed by the granting of the petition.

IV. SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that the proceeding in the trial court here was for civil contempt and not for criminal contempt and erred in holding that the appeal should have been taken by a petition, citation, and should, of the trial judge have an order of allowance of the said appeal, and that the rules for criminal appeals did not apply: and therefore dismissed the appeal.

V. ARGUMENT

The proceeding in the trial court cannot be legally classified as civil contempt. In their official capacities Special Agents of the Bureau of Internal Revenue have no powers to serve any private person. Their duties are confined to serving the United States. No private person has any rights for the special agent to concern himself about. Any attempt on his part to serve any private litigant would be an illegal deviation from his line of duty. He himself cannot become a *party to any litigation* in his official capacity. There was no party adversary to McCrone in the trial court but the United States. Had McCrone attempted to perfect an appeal as from a judgment finding him guilty of civil contempt, his attempt would have been abortive because there was no private person in existence on whom to serve his petition for or citation on appeal. Declaratory judgments may be obtained. Declaratory appeals are not yet permitted.

If this exact case should arise again and the new rules were not in effect, and we should attempt to appeal by petition and citation, the appeal would necessarily be dismissed because of lack of a civil party adversary to

the appeal. Citation could be served on the United States District Attorney. He would answer that he represented only the United States; no private party.

Everything about the proceeding in the trial court seems illogical if one tries to view it as a civil proceeding. McCrone was not a party to any civil case, proceeding in bankruptcy, etc. No case or proceeding of a civil nature was pending in any court. The United States District Attorney by deputy was prosecuting as an officer of the United States. The citation to McCrone was that he show cause why he should not be punished for a completed offense named in the citation. (R. 46.) He pleads not guilty. (7 R.) He is placed in jeopardy. He himself put in a few sentences of testimony. He was actually found guilty; by the careful selection of synonyms to express the meaning and refraining from using the exact word. He was punished. He served 10 or more days in jail after admission to bail was denied. In the case of Gompers v. Buck Stove Co., 221 U. S. 418, the Court held that when the civil case ended, thereby any order punishing for civil contempt ipso facto was dissolved. Unless McCrone decided to abandon to judicial force his rights not to be made a witness against himself, he is in for life, because there has not been begun any civil case or proceeding which may come to an end. Only the Government of the United States had any concern in the matter. We have searched in vain for any case where without a civil case or proceeding pending any court ever held a person guilty of civil contempt. This is an innovation and a dangerous one. Would the bond in a civil appeal run to DeFoe?

We think the learned Court of Appeals erred, and then proceeded to an erroneous decision, in the following sentence:

> "It has been held that for the purposes of review, the form of the order determines the character of the proceeding."
>
> R. 113.

That court must mean "nature" by the word "character." The rights of man, not the rights of courts, were to be protected by the Bill of Rights. While there is no express statement in the Sixth Amendment that the information as to the nature of the proceeding must be given the accused "at the outset," yet it appears before the words "to have witnesses for his defense." It has been consistently held that arraignment at the *outset* is of the essence and that the "nature" once asserted cannot be changed, i. e., if arraigned for assault and battery, the nature of the proceeding could not be changed by a judgment for civil damages in favor of the victim of the assault or an injunction not to repeat the offense. An appeal from such would be an appeal under the rules for criminal cases.

In every of the four cases cited (R. 114) in support of its theorem by the Court of Appeals there was a suit or proceeding pending between private litigants, or some judgment to be enforced for a private litigant. For the benefit of such a party the order had been made punishing for contempt. But of course that had to be. No case can be found punishing or holding guilty of civil contempt without a civil case or proceeding or a civil judgment

to be enforced, out of which the contempt proceeding originated—except the case at bar. At least we have made careful search—and none has been cited by government counsel. Criminal contempt is of the rule: civil contempt an exception. It may be easy for a proceeding started under the exception to break over to the rule by a judgment that part of the fine be paid to the United States. Much confusion has arisen, however, by permitting this.

In Wilson v. Byron Jackson Co., 93 Fed. 2d 577 (C. C. A. 9th), a proceeding was begun as for civil contempt. There were two fines, one of $125 for violation of the court's order (in a civil case) and a remedial fine of $1,044. Counsel appealed by procedure for civil appeals, but failed to appeal within five days as required by the rules for criminal appeals. The appeal was dismissed, December, 1937.

We are unkind enough to assert that if McCrone had neglected for five days to take his appeal but had attempted to pursue the method for civil appeals the Government Counsel would have moved to dismiss the appeal because it had not met the requirements for criminal appeals.

There would have been cited in support of the motion Wilson v. Byron Jackson Co., (C. C. A. 9) 93 Fed. 2nd 577. The proceeding in that case had less resemblance to criminal contempt than the one at bar. That proceeding for contempt was to fortify a civil judgment of one private person against another. Nothing like that exists here. That contempt proceeding was prosecuted by private counsel. This is prosecuted by the District Attor-

ney of the United States acting (at least de facto) by virtue of his office. That judgment provided for payment of $125 to the government. This demands that he surrender to the government in a secret hearing a right guaranteed him.

McCrone's counsel do not seek to justify or extenuate their work through oversight or forgetfulness or accident in pursuing the method of criminal appeals. The Court of Appeals is justified in saying, "Indeed appellant does not contend that there was anything equivalent to an application for and allowance of an appeal. * * *" (R. 116.) Nor did we expect in April any benefit of the contingency that the hearing of the appeal would take place after September 16th, when the new rules would be in effect. If wrong, it is due not to carelessness but to a judicial confusion of the entire subject. We cannot get the same answer as the Court of Appeals to the question of what is a civil and what a criminal case. Outside of law schools, and law books, the ordinary man, "who is held to know all the law," would believe that, if after a hearing in a United States Court prosecuted by the United States District Attorney, at the instance of a Revenue Officer, a judgment is rendered by virtue of which the Marshal confines him in jail (and when no neighbor or citizen charged him with infraction of his civil rights), he had been through a criminal case.

When the subpoena without names is considered seriously, when it is seen from itself that the person summoned may be forced to bring with him any books, papers, etc., wished by the special agent:—if the hearing may be had as here it was had, secretly, out of the presence

of a judicial officer to protect the witness in his various basic rights:—when there is no immunity statute:—does it not permit to be done thus in secret by undue influence and threat of "civil contempt" punishment, many things that courts of the United States will not and cannot permit to be done in their presence?

There are essential differences, at least in the procedure, between civil contempt and criminal contempt. Instances arise where results to the accused for civil contempt are more serious than for criminal contempt. According to the view held by the trial judge here, the offense of civil contempt is so serious that admission to bail pending appeal should be denied. No bond is required on appeal from a judgment for criminal contempt. In tempering punishment for criminal contempt a court must remember that cruel and unusual punishment must be omitted. Bail in $7,500 ordered here, which for this alleged offense might have been deemed excessive in 1789, may not be fixed at $75,000, we will say. An affidavit ex parte seems enough on a charge of civil contempt to shift the burden of proof to the accused, if the view of the trial judge here was the correct one. It certainly cannot be enough on a charge of criminal contempt. There the accused must be confronted with the witnesses against him.

Because:

> "The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and the other the violation of a law. * * * These contempts are infractions of the law, visited with punishment as such. If such

> acts are not criminal, we are in error as to the most fundamental characteristics of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved, that in the early law they were punished only by the usual criminal procedure, * * * and that at least in England it seems that they still may be and preferably are tried in that way."
>
> United States v. Goldman, 277 U. S. 228.

A plea of former jeopardy would not be heard to deprive a civil litigant party of his rights on a second petition, to an order for civil contempt against his adversary. Circumstances can arise where it is a valid plea in a prosecution for criminal contempt. No Federal statute of limitation exists to bar a petition, of an aggrieved party to a suit, for punishment of his adversary for civil contempt. But of course the end of the strife between private litigants and satisfaction of judgment marks the end of prosecution or punishment for civil contempt.

Gompers v. Buck Stove Co., 221 U. S. 418.

Statutes exist limiting prosecutions for criminal contempts.

Some of our statements may seem so obvious that the Court may subconsciously resent our making them here. But we were not sufficiently perspicuous in the Court of Appeals.

The only motion in the Court of Appeals to dismiss the appeal was by oral argument of the Government's counsel at the regular hearing of the appeal. Perhaps our strategy was faulty or entirely lacking in not seeking to answer the motion by printed argument. We did state

our position and cite cases in petition for rehearing. The petition was denied.

We think that it is as impossible to conceive of a proceeding for civil contempt when there is no cause or proceeding before a court in which private citizens have rights as it is "to present the play of Hamlet with no actor to impersonate the Gloomy Dane."

The Circuit Court of Appeals of the Seventh Circuit thinks there is a still further limit to prosecutions for civil contempt than the absence of a civil suit or proceeding. It holds that even though there be a suit pending or judgment unsatisfied in which private litigants have financial interest, yet a governmental bureau, i. e., Federal Trade Commission, therein has no right to prosecute for civil contempt.

> "In reply to respondents' motions to dismiss, petitioner, the Commission, stated that its proceeding was one for civil contempt, and that it was a part of a proceeding based upon Section 5 of the Federal Trade Commission Act, 15 U.S.C.A., Sec. 45, which provides for a civil proceeding only and for a decree in the nature of an injunction; that it was not punitive; that it was wholly remedial, being prosecuted in the public interest; and that it was ancillary to the main case and in aid of the enforcement of the decree of this court."
>
> Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

> "The Commission thus asserted its right, as a party injured by violation of a decree in its favor, to the remedy or relief afforded by means of civil contempt proceedings. As we studied the questions presented by the petitions and briefs filed prior to the hearing, and by the oral argument on hearing of the motions

to dismiss, we concluded that the Commission was not entitled to the relief sought, by the means sought. It appeared that the question of the right of an administrative board, an agency of the Government, created principally for the purpose of regulating competition, to invoke rights customarily accorded to private litigants, had not previously been raised nor settled. Since the procedure followed was that employed in proceedings for civil contempt, according to the rules laid down in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 S. C. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874, and the Commission treated it as such in its petition and briefs, we concluded that the first question before us was whether the Commission was entitled to institute proceedings for civil contempt as a part of its civil proceedings against the respondents which had culminated in an order of this court to enforce the cease and desist order of the Commission. Having found that the protection of private rights was emphasized throughout the cases relating to civil contempt proceedings as their principal purpose, we became convinced that the Commission, an agency of the Government, representing no private interest of its own, but acting solely in the public interest, had no such standing as a private party that it could utilize procedure intended to safeguard the rights and interests of private parties. That the Commission does act in the public interest alone we think there can be no question."

Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

"We consider this fact of importance for the reason that it has been generally held that the party against whom such proceedings are attempted to be had is entitled to know from the outset whether the proceedings against him are civil or criminal in their nature. The Court of Appeals for the Second Circuit discussed this in McCann v. New York Stock

Exchange, 80 F. 2d, 211, 214, an appeal from an order fining appellant for contempt of court. In reversing the order, the court said:

"'Nor can we affirm it as punishment for a criminal contempt. The lower federal courts have not been very clear about the proper practice in such applications since Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874. It has been their custom to determine their character, whether civil or criminal, by resort to a number of elements, some purely formal, some substantial; such as the title of the proceeding, whether costs were demanded, whether the parties were examined, who conducted the prosecution. * * * The result of all this has been most unsatisfactory and has defeated its own purpose, which was to advise the respondent at the outset of the nature of the application. * * * Criminal prosecutions, that is, those which result in a punishment, vindictive as opposed to remedial, are prosecuted either by the United States or by the court to assert its authority. * * *'"

Federal Trade Commission v. A. McLean & Son, 94 Fed. 2d, p. 802.

"Proceedings for contempts are of two classes—those prosecuted to preserve the power, and vindicate the dignity, of the court, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

Bessette v. W. B. Conkey Co., 194 U. S., p. 324.

McCrone is a mighty obscure citizen to be invoking the aid of this Court. So situated once, now immortalized, was:

> "Some village Hampden that with dauntless breast
> The little tyrant of his fields withstood."

We apologize for using a slang expression, no other as fit comes to mind; "The Third Degree" method has deserved the grave attention of the American Bar Association.

McCrone's hearing was secret. He asked the Court to allow a stenographer of his own choice to be present at the hearing before Mr. DeFoe; to no result. (28 R.)

No counsel was permitted to enter the Star Chamber with him. (48 R.)

Neither the order nor the subpoena defined or even suggested what investigation was going on. Such hearings when a witness claims his rights not to answer can rightly be continued only in court. Then the witness can have a decision as to his rights before he gives them up under fear of being in unintentional contempt.

It is a wretched subterfuge to argue on behalf of the Government that the entire proceeding in the trial court was void any way: that he was required to answer only "material questions" to an undefined investigation, i. e., to no investigation at all: that he could not be in contempt because no particular question can legally be held to be material to an undefined subject.

An examination for a similar purpose as the one at bar appears in: In re Doyle, 42 Fed. 2nd, 686. This took place in open court. Some of Doyle's objections

were sustained. Some were overruled. Questions almost identical were asked Doyle that were asked McCrone. On appeal from commitment, this was reversed without opinion—per curiam. United States v. Doyle, 47 F. 2nd, 1086.

Doyle was permitted to lay his objections before a judicial, rather than exclusively before a ministerial officer.

As to the dissenting opinion of Judge Haney in the court below, while we agree with its logic and the charm with which it is expressed, the question on which it hangs and on which he bases it does not seem to us of sufficient importance to distract the attention of this Court from the constitutional questions involved in our main contention. It is needless to say that like all other counsel who ever procured a dissenting opinion in their favor, we agree with it and commend it highly.

Because of the shortness of time we have not been able to do more than reprint and supplement slightly our brief in support of our petition for certiorari. The petition was granted on the 13th day of March, 1939; it was set for argument for the 30th; notice of setting was given by mail which reached us in due course on March 18th, leaving us twelve days; and we are three days' journey from the Court. However, we feel that the advancement is fortunate in all other respects and appreciate the promptness with which it is to be considered.

The case merits review by this Court even though it, on its face, seems to involve only a point of procedure, because the opinion of the Court of Appeals on this procedural question was based on a serious theorem of

substantive law, erroneously (as we think) decided by both the Court of Appeals and the District Court. This error, if it be error, unless corrected, would extend the jurisdiction of the National Courts to punish for alleged contempts in a manner not heretofore known and probably never before attempted, and not provided by statute, even contrary to statute law. The decision of the Court of Appeals seeming to be only on a question of practice, unless reversed, can be cited as a precedent for new powers of Governmental Bureaus and new powers of Federal Courts, corrosive of the Bill of Rights.

We think that the enforcement powers of the special agent of the Commissioner of Internal Revenue and of the District Court in this proceeding arise from subdivision (e) of Section 1515, Title 26, U. S. C. A.: That these powers are limited by that section and provisions of statute and other law to which that section refers.

We italicize part of that section in quoting it:

> "(e) Enforcement. Whenever any person summoned under this section neglects or refuses to obey such summons, or to give testimony, or to answer interrogatories as required, the collector may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, *and upon his being brought before him to proceed to a hearing of the case;* and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper *not inconsistent with existing laws for the punishment of contempts,* to enforce

obedience to the requirements of the summons and to punish such person for his default or disobedience. (R. S., Sec. 3175; Mar. 2, 1901, c. 814, 31 Stat. 956.)"

The words "existing laws for the punishment of contempts" we think refer specifically to statute law and generally to that body of law concerning the inherent power of courts to punish for contempt as found in decisions of Federal Courts published at the date of the enactment, then accessible to jurisconsults or even provincials in the profession. If the Congress had intended to permit enforcement by new methods to be devised thereafter, then unknown, it might have said so—but the courts should have said that such grants or demands were unenforceable—that the courts had no legislative powers.

An old, old statute, now Section 385, U. S. C. A., Title 28; Judicial Code, Section 268, seems to be applicable:

"385. (Judicial Code, section 268.) Administration of oaths; contempts.—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S., Sec. 725; Mar. 3, 1911, c. 231, Sec. 268, 36 Stat. 1163.)"

It has been said seriously in argument before the trial Court and before the Court of Appeals that whereas the United States can and does bring civil suits in equity and civil actions at law that therefore this might be a proceeding in aid of such a contemplated civil suit or action and consequently a civil contempt. The only deduction possible from that line of argument, (there is no alternative) is that the *nature* of McCrone's offense at the time committed would depend on something the Internal Revenue Bureau might do sometime after he committed it. In other words, that the Bureau could enact an ex post facto law punishing either way it desired, through court action of course, the acts of McCrone. But these acts were designated as already *completed* in the citation. (R. 46.)

It is elementary that many courts hold that one test between civil and criminal contempt is that if the offense be a completed one, as set forth in this citation, the contempt is a criminal contempt, not civil.

The Court of Appeals from which this case comes has found a different answer at another time about the nature of a contempt committed in obstruction of an injunction which had been granted in a civil suit that the Government was prosecuting in equity about its proprietary rights in a vessel. The contention there was made that the contempt was civil but the Court of Appeals of the Ninth Circuit held it to be criminal contempt, and we think correctly so. Forrest vs. United States (C. C. A. 9th), 277 Fed. 873.

In a broad outlook on this case, and of the countless decisions relevant to phases of it, we suggest that the

Court will not feel that time has been wasted after considering Counselman vs. Hitchcock, 142 U. S. 547. And for a similar case where the Bureau of Internal Revenue was seeking an examination there is a District Court decision that we think merits consideration, Internal Revenue Agent vs. Sullivan, 287 Fed. 138. Historically intriguing is:

> U. S. v. Burr, in re Willie, Case No. 14,692 E., 25 Fed. Cases, p. 38.

As to the merits of the appeal to the Circuit Court of Appeals we hesitate to go into that phase except as it concerns the importance of the case to all citizens and thus to show that it is worthy of review by this Court; and we take it that if petitioner is successful in this Court the case will be ordered reinstated on the regular docket for decision on the merits by the Court of Appeals. However, the merits of the appeal we think may be demonstrated in a few sentences.

McCrone was ordered to appear before Paul W. DeFoe, an agent and officer of the Internal Revenue Bureau, and give his testimony of all matters and facts within his knowledge concerning the subject matter of the inquiry and investigation now being carried on by the said Paul W. DeFoe * * * and continue such attendance until he had given all of his testimony and made a full, true, complete, accurate and truthful disclosure of all matters and facts within his knowledge material and pertinent and concerning the subject matter of the investigation now being carried on by such officer. (R. 42.) The summons contains only that he give testimony in the

matter of tax liability of the above named person for the years designated. No person is designated; the years are set forth, 1932 to 1937, and no person whose income tax was being investigated is designated anywhere in the record. Such an order gives the Government Bureau, if such an order is valid, right to inquire into matters of McCrone's income tax reports that might incriminate him and to inquire into those of his wife that might incriminate her. Such orders lack that certainty which is needed to make them enforceable. Federal Trade Commission vs. American Tobacco Company, 264 U. S. 298; Zimmerman vs. Wilson, 81 Fed. (2d) 847.

It is difficult to hold any question and answer material or immaterial to an undefined investigation dependent on the will of any ministerial officer.

McCrone was cited into court for disobedience of such an order. He entered a plea of not guilty. No evidence was introduced against him. He placed himself in jeopardy by himself stating that he had refused to answer several questions because they would tend to incriminate him under United States laws. (71 R.) But outside of his own testimony, there was no testimony introduced against him, and that was surely not sufficient to overcome the burden of proof on the Government. At the secret hearing before DeFoe, McCrone had been denied the request that a stenographer of his own choice be present. He had been denied the privilege of having counsel attend the hearing with him. It was a secret hearing; everything was wide open to demand any information of him without the presence of any judicial officer to protect him in his basic rights and under the

compelling force *which was administered here* of being guilty of civil contempt, where there is no limit to the punishment if he refused to yield his basic rights without any judge or court present to protect him in them. When such investigations are faced with such protests of a witness, the only way that the rights of the witness can be protected is by adjourning the hearing to the presence of a judicial officer of the United States, where, when the questions are put, the witness may state his objections and have the benefit of a judicial decision thereon, and such has been the usual practice in other jurisdictions. Such is the plain meaning of the Act of Congress heretofore copied—Subd. E. Sect. 1515. Tit. 26 U. S. C. A.

We respectfully submit that the decision of the Honorable The Circuit Court of Appeals of the Ninth Circuit of the United States should be reversed and that the appeal to that Court be ordered reinstated for hearing and decision on its merits.

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